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**Issue Date: 10 July 2007**

**Case No.: 2006-BLA-05237**

*In the Matter of:*

**C.H.,**
*Claimant,*

v.

**BECKY COAL CO., INC.,**
*Employer,*

**KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND,**
*Carrier,*

and

**DIRECTOR, OWCP,**
*Party-in-Interest.*

**APPEARANCES:** John Grigsby, Esquire
For the Claimant

Rodney E. Buttermore, Jr., Esquire
For the Employer

**BEFORE:** John M. Vittone
Chief Administrative Law Judge

# DECISION AND ORDER DENYING LIVING MINER'S BENEFITS

This case arises from a claim for benefits filed under the "Black Lung Benefits Act," Title IV of the Federal Coal Mine Health and Safety Act of 1969, at 30 U.S.C. § 901 *et seq.* ("Act"), and the implementing regulations issued thereunder. The Act and implementing regulations provide compensation and other benefits to living coal miners who are totally disabled due to pneumoconiosis and their dependents, and surviving dependents of coal miners whose death was caused by pneumoconiosis. In this case, C.H. ("Claimant"), alleges that he is

totally disabled by pneumoconiosis.

A formal hearing was held in London, Kentucky, on January 25, 2007. The decision in this matter is based upon the testimony of the Claimant at the hearing (*Tr.)*, all documentary evidence admitted into the record at the hearing, and the post-hearing arguments of the parties. The documentary evidence includes *Director's Exhibits* (*DX*) 1-47, *Claimant's Exhibits* (*CX*) 1-2, *Employer's Exhibits (EX)* 1-5.

## PROCEDURAL HISTORY

The Claimant filed his first living miner's claim for benefits on September 17, 1990. *DX 1 at 396.* The District Director, Office of Workers' Compensation Programs ("District Director"), denied benefits on February 15, 1991. *DX 1 at 332.* The Administrative Law Judge ("ALJ") then denied benefits on August 26, 1992, because the evidence failed to show that the Claimant was totally disabled due to pneumoconiosis.[1] *DX 1 at 105.* Gatliff Coal Company was listed as the designated Responsible Operator. *DX 1 at 106.* The Benefits Review Board ("BRB") upheld the ALJ's decision on October 22, 1993.[2] *DX 1 at 35.* The Claimant's petition for review was then denied by the U.S. Court of Appeals for the Sixth Circuit on October 9, 1996. *DX 1 at 13.*

The Claimant filed his second claim for benefits on January 30, 2001. *DX 2 at 98.* The District Director issued a Proposed Decision and Order on August 21, 2002, denying benefits because the evidence failed to establish that the Claimant is totally disabled by pneumoconiosis. *DX 2 at 3.* Gatliff Coal Company was listed as the designated Responsible Operator. *Id.* The Claimant did not appeal the District Director's decision.

The Claimant filed the present claim for benefits on January 7, 2005. *DX 4 at 4.* The District Director denied benefits on September 14, 2005, determining that the evidence did not show that the Claimant is totally disabled due to pneumoconiosis. *DX 40 at 5.* Becky Coal Company ("Employer") was listed as designated Responsible Operator. *Id.* The Claimant appealed the decision on September 16, 2005. *DX 41.* The matter was referred to the OALJ and a hearing was held in London, Kentucky, on January 25, 2007. The Claimant submitted his post-hearing argument on March 30, 2007, and the Employer's arrived on April 3, 2007.

## ISSUES PRESENTED FOR ADJUDICATION AND STIPULATIONS

The Employer and/or the Director contested the following issues on the Form CM-1025:

1. Whether the evidence establishes a material change in conditions per 20 C.F.R. § 725.309(c), (d).

[1] The Office of Administrative Law Judges ("OALJ") case number was 1991-BLA-02205. *DX 1 at 105.*
[2] The Benefits Review Board case number was 92-2429 BLA. *DX 1 at 35.*

2. Whether the Claimant worked at least 30 years in or around one or more of the coal mines.
3. Whether the Claimant has pneumoconiosis as defined by the Act and the regulations.
4. Whether the Claimant's pneumoconiosis arose out of coal mine employment.
5. Whether the Claimant is totally disabled.
6. Whether the Claimant's disability is due to pneumoconiosis.
7. Whether the named employer is the Responsible Operator.
8. Whether the Claimant's most recent period of cumulative employment of not less than one year was with the named Responsible Operator.

*DX 45 at 1-2.* At the hearing, the Employer withdrew four of its objections that had been listed on the Form CM-1025. *Tr. 14.* The Employer stipulated that the claim was timely filed; the Claimant qualifies as a miner; the Claimant worked as a miner after December 31, 1969; and the Claimant worked for at least 30 years in or around one or more coal mines.[3] *Id.* The Employer also corrected a mistake on the Form CM-1025, noting that it does not contest whether the named employer has secured the payment of benefits. *Tr. 15.*

## FACTUAL BACKGROUND AND CLAIMANT'S TESTIMONY

The Claimant testified at the formal hearing and by deposition taken on January 26, 2006. He was born in 1939 and is married to J.H. *Tr. 17.* The Claimant and his wife have five children but none is dependent for augmentation purposes. *Id.* The Claimant testified that he has never gone to school and that he began working as a coal miner in 1955. *Tr. 18 & EX 3 at 13.* He retired in 1989. *Tr. 18.* The Claimant performed a variety of tasks in the mines throughout his career including acting as a scoop operator, a bridge operator behind a Wilcox continuous miner, and a jack setter at the face. *DX 9.* He also performed maintenance, rock dusted, hung curtains, laid water lines, cleaned belt lines, and did "anything else to be done in and around coal mines." *Id.* He testified that he loaded the coal with a hand loader shovel at the face of the mine and then took it to the area where the drag pans were. *Tr. 18.* The Claimant testified that he also pulled the coal from a loader onto a ram car. *Tr. 19.* While working for the Employer, the Claimant operated a large hydraulic scoop, pulling coal from the face of the mine. *EX 3 at 17.* When asked if he wore a mask when he worked as an underground miner, the Claimant testified that he was unable to because the masks would get clogged when he worked with the Wilcox miner. *Tr. 26.* The Claimant testified that the dust was so thick in the mines that he could not see his hand if he held it out in front of him. *Tr. 22.*

When questioned about the physical activity required by his work in the mines, the Claimant testified that he had to lift equipment weighing fifty to sixty pounds all day when he worked setting jacks in the mines. *Tr. 21-22.* When he shoveled coal, he would shovel and move heavy loads all day so that "at dinnertime, [he] was shaking so bad." *Tr. 22-23.* The Claimant testified that he lifted 75 to 80 pounds at a time at the belt lines and carried 50 to 80 pound bags when he scattered rock dust to keep the dust levels down. *Tr. 23-25.* The Claimant

[3] Although the Employer stipulated to length of coal mine employment, the Director's objection remains. *DX 45 at 1-2.*

also explained that he spent 15 years in blue gem mines, where he had to crawl through small spaces through the eight-hour workday. *Tr. 26; DX 9.*

The Claimant testified that his last job was at Paul's Repair Shop, where he worked less than a year. *Tr. 27 & 34.* Although it was an underground coal mining operation, the Claimant worked in the outside area. *Tr. 35 & 43.* The Claimant testified that the job involved pumping water, changing 25 to 30 pound tires, operating a highlift and occasionally unloading coal from trucks. *Tr. 27; EX 3 at 12.* The Claimant testified that he moved to the job outside of the mine because he "couldn't handle it underground no more [sic]" and could not keep up with the other miners because his breathing "wouldn't hold up" and he could no longer crawl in the mines. *Tr. 28; EX 3 at 43.* The Claimant testified that he had to leave his position at Paul's Repair Shop because of injuries resulting from an automobile accident. *Tr. 34.* All of his coal mining work was underground except for his last position at Paul's Repair Shop. *EX 3 at 23.*

The Claimant then testified about his health which he says is deteriorating. The Claimant testified that he has difficulty walking up hills, noting that loses his breath and his heart "starts acting up." *Tr. 29.* The Claimant stated that he can no longer travel or hunt and has difficulty sleeping because he "wake[s] up smothering and wheezing" and has to sit in a chair and drink water to recover. *Tr. 29-30.* The Claimant also has difficulty doing household chores such as mowing the lawn because he has to sit down and catch his breath. *EX 3 at 36.* The Claimant stated that he coughs "quite a bit" and has coughed up blood a couple of times. *Tr. 30.* The Claimant testified that he has never been diagnosed with tuberculosis, histoplasmosis, or pleurisy, but has had pneumonia twice. *Tr. 30 & 42.* The Claimant currently uses an Albuterol inhaler and an additional unnamed medicine and also finds relief in breathing steam from boiling salt water or from sitting in front of an air conditioner. *Tr. 31; EX 3 at 40 & 44.* The Claimant testified that he has never smoked. *Tr. 32.* The Claimant has been treated by Dr. Chalhoub for a heart condition since 2000. *Tr. 35; EX 3 at 26.* When asked if he could go back to his coal mining work, the Claimant responded "No way, no way . . . No way I could." *Tr. 33.*

## DISCUSSION

### *Subsequent Claim Threshold Issue*

To prevail in a claim for Black Lung Benefits, the Claimant bears the burden of establishing each of the following elements by a preponderance of the evidence: (1) he suffers from pneumoconiosis; (2) arising out of coal mine employment; (3) he is totally disabled; and (4) his total disability is caused by pneumoconiosis. 20 C.F.R. § 718 (2005); *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986)(en banc); *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65 (1986)(en banc).

The instant claim was filed more than one year after the denial of a prior claim for benefits and, therefore, is a subsequent claim. The interest of the claimant in being afforded an opportunity to submit recent evidence of a progressive occupational disease, such as black lung, must be weighed against the interests of administrative finality and the effective administration of claims. The provisions at 20 C.F.R. § 725.309 (2005) attempt to strike a balance between

these competing interests by permitting the miner to file subsequent claims, but direct that such claims must be denied on the same grounds as the previously denied claim unless the claimant can demonstrate an element of entitlement previously adjudicated against him.[4] If a claimant demonstrates a change in one of the applicable conditions of entitlement, then findings made in the prior claims are not binding on the parties. 20 C.F.R. § 725.309(d)(4). Consequently, the relevant inquiry in a subsequent claim is whether evidence developed since the prior adjudication would now support a finding of a previously denied condition of entitlement.

The Claimant's prior claim was finally denied for failure to establish total disability due in part to his pneumoconiosis. 20 C.F.R. §§ 718.202 - 718.204; *DX 40 at 5.* Thus, for the purposes of adjudicating the present subsequent claim, the newly submitted evidence must establish that Claimant has a totally disabling pulmonary impairment caused by pneumoconiosis. The regulations state the following:

> For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.

20 C.F.R. § 718.204(a) (2005).

Twenty C.F.R. § 718.204(b) (2005) provides the following five methods to establish total disability: (1) qualifying pulmonary function studies; (2) qualifying blood gas studies; (3) evidence of cor pulmonale with right-sided congestive heart failure; (4) reasoned medical opinions; and (5) lay testimony.[5]

*A. Pulmonary Function Studies*

Total disability may be established through a preponderance of qualifying pulmonary function studies. The pulmonary function study, also referred to as a ventilatory study or spirometry, measures obstruction in the airways of the lungs. The greater the resistance to the flow of air, the more severe any lung impairment. A pulmonary function study does not indicate the existence of pneumoconiosis; rather, it is utilized to measure the level of the miner's disability.

[4] In its comments to the regulations, the Department states that "[a]dditional or subsequent claims must be allowed in light of the latent, progressive nature of pneumoconiosis. Thus, the additional claim is a different case, with different facts (if the claimant is correct that his condition has progressed)." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,974 (Dec. 20, 2000).

[5] The Board holds that a judge cannot rely solely upon lay evidence to find total disability in a living miner's claim. *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994).

In performing the study, the miner is required to blow hard into a mouthpiece which is connected to a flowmeter. The spirometer records the amount of air expired over a period of time onto tracings. To ascertain the forced expiratory volume, the miner inspires maximally, pauses, and then expires as forcefully and rapidly as possible. The volume of air expired over a period of one second is the FEV1. An abnormal decrease in the FEV1 value is the result of a decrease in air flow which, in turn, is considered by some physicians to indicate the existence of an obstructive airway disease. The forced vital capacity (FVC) is the total lung capacity minus any residual volume of air in the lung after expiration. The maximum voluntary volume (MVV) is the volume of air expired over a 15 second period where the miner breathes as rapidly and deeply a possible. A decrease in the FVC and/or MVV values is considered by some physicians to indicate the presence of a restrictive airway disease or a loss of lung volume.

The values from the FEV1 as well as the MVV or FVC must be in the record, and the highest values under each category from the trials are used to determine the level of the miner's disability. The quality standards for pulmonary function studies are located at 20 C.F.R. § 718.103 and require, in relevant part, that (1) each study be accompanied by three tracings, *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984), (2) the reported FEV1 and FVC or MVV values constitute the best efforts of three trials, and, (3) a flow-volume loop. The administrative law judge may accord lesser weight to those studies where the miner exhibited "poor" cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP*, 6 B.L.R. 1-945 (1984).

To be qualifying, the regulations provide that the FEV1 value must be qualifying *and* either (1) the MVV or FVC values must be equal to or fall below those values listed at Appendix B for a miner of similar gender, age, and height, or (2) the result of the FEV1 divided by the FVC is equal to or less that 55 percent. The following pulmonary function studies are in the record:[6]

| Exhibit | Date of Test | Physician | Age/ height (in) | Cooperation/ Comprehension | Tracings/ flow volume loop on record? | Broncho-dilator (pre/post) | FEV1 (pre/post) | FVC (pre/post) | Qualifies? |
|---|---|---|---|---|---|---|---|---|---|
| CX 2 at 6 & EX 4 | 12/16/05 | Dr. Charles Bruton | 66/ 68.75 | Not Noted | Yes | Pre | 2.87 | 3.47 | No |
| DX 13 at 4 | 2/18/05 | Dr. Glen Baker | 66/ 68.75 | Fair/Good | Yes | Pre | 2.77 | 3.65 | No |

[6] The factfinder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). Drs. Bruton and Baker recorded the Claimant's height as 69 inches. Dr. Dahhan recorded it as 68.25 inches. I calculated the average of the heights and used 68.75 inches for the purposes of analyzing the results of the pulmonary function studies.

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| EX 1 | 11/14/05 | Dr. Abdul Dahhan | 66/ 68.75 | Good/Good | Yes | Pre/ Post | 2.17/ 2.54 | 2.73/ 3.10[7] | No |

Based upon the foregoing, the Claimant has not established total disability pursuant to 20 C.F.R. § 718.204(b)(2)(i) of the regulations. There are no qualifying pulmonary function studies in the record. All failed to qualify because the FEV1 levels were above the values in Appendix B of 20 C.F.R. Part 718. As a result, none of the pulmonary function studies establish that the Claimant has a total disability pursuant to § 718.204(b)(2)(i).

*B. Arterial Blood Gas Studies*

Total disability may also be established by qualifying blood gas studies under 20 C.F.R. § 718.204(b)(2)(ii). A blood gas study is designed to measure the ability of the lungs to oxygenate blood. Alveoli are air sacs which line the lungs in a honeycomb pattern. Oxygen passes through the alveoli into the bloodstream on inspiration and carbon dioxide is released from the bloodstream on expiration. A lower level of oxygen compared to carbon dioxide in the blood indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled. In performing the study, a blood sample is taken from the miner at rest and, if possible, after exercise. The blood sample is analyzed for the percentage of oxygen (PO2) and the percentage of carbon dioxide (PCO2) in the blood. Tables are provided in the regulations for determining whether the study yields qualifying values, thus lending support for a finding that the miner is totally disabled. 20 C.F.R. § 718.204.204(b)(2)(ii) (2005) and Appendix C.

In order to be qualifying, the PO2 values corresponding to the PCO2 values must be equal to or less than those found at the table at Appendix C. The following blood gas studies are in the record:

| Exhibit | Date of Test | Physician | Altitude (feet) | Resting/Exercise | PCO2 | PO2 | Qualifies? |
|---|---|---|---|---|---|---|---|
| CX 2 at 14 | 12/15/05; 9:08 a.m. | Dr. Charles Bruton | 0-2,999 feet above sea level | Resting | 37.3 | 68.6 | No |
| CX 2 at 15; EX 4 at 13 | 12/15/05; 10:45 a.m. | Dr. Charles Bruton | 0-2,999 feet above sea level | Resting | 37.0 | 70.5 | No |
| DX 13 at 9 | 2/18/05 | Dr. Glen Baker | 0-2,999 feet above sea level | Resting | 40 | 72 | No |
| EX 1 | 11/14/05 | Dr. Abdul Dahhan | 0-2,999 feet above sea level | Resting | 37.6 | 75.1 | No |

[7] Dr. Dahhan's pulmonary function studies report did not list the FVC values for the trial he selected. *EX 1 at 6.* The supporting documents listed the values for three different sets of trials. I chose the FVC value for the trial that matched the FEV1 values listed on the cover report. *EX 1 at 7-8.* The chosen trial represents the pre-bronchodilator trial taken at 11:32:19 and the post-bronchodilator taken 11:51:19. *EX 1 at 7.*

Each of the blood gas studies resulted in PO2 values greater than those corresponding to the qualifying PCO2 values in the table of Appendix C of 20 C.F.R. Part 718. Based upon the foregoing, the Claimant has not demonstrated total disability pursuant to the regulations at 20 C.F.R. § 718.204(b)(2)(ii).

*C. Cor Pulmonale with Right-Sided Congestive Heart Failure*

There is no evidence of cor pulmonale with right-sided congestive heart failure. As a result, the Claimant has not established total disability under section 718.204(b)(2)(iii).

*D. Medical Opinion Evidence and Lay Testimony*

Where total disability cannot be established by pulmonary functions studies, blood gas studies, or by evidence of cor pulmonale, it may be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents him from engaging in his usual or comparable coal mine employment. 20 C.F.R. § 718.204(b)(1) (2005). Under this section, "all the evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element." *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201, 1-204 (1986). In assessing total disability under § 718.204(b)(2)(iv) (2005), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). In this case, the Claimant appeared credible and testified at the hearing that usual coal mine employment included extensive lifting and crawling. Based on this record, it is determined that Claimant performed heavy manual labor.

The regulations contain specific quality standards for medical opinion evidence at 20 C.F.R. §718.104 (2005):

> (a) A report of any physical examination conducted in connection with a claim shall be prepared on a medical report form supplied by the office or in a manner containing substantially the same information. Any such report shall include the following information and test results:
>
> (1) The miner's medical and employment history;
>
> (2) All manifestations of chronic respiratory disease;
>
> (3) Any pertinent findings not specifically listed on the form;
>
> (4) If heart disease secondary to lung disease is found, all symptoms and significant findings;
>
> (5) The results of a chest X-ray conducted and interpreted as required by Sec. 718.102; and

(6) The results of a pulmonary function test conducted and reported as required by Sec. 718.103. If the miner is physically unable to perform a pulmonary function test or if the test is medically contraindicated, in the absence of evidence establishing total disability pursuant to Sec. 718.304, the report must be based on either medically acceptable clinical and laboratory diagnostic techniques, such as a blood gas study.

(b) In addition to the requirements of paragraph (a), a report of physical examination may be based on any other procedures such as electrocardiogram, blood gas studies conducted and reported as required by Sec. 718.105, and other blood analyses which, in the physician's opinion, aid in his or her evaluation of the miner.

20 C.F.R. §718.104 (2005). Significant to the discussion of medical opinions is whether the physician's qualifications are known and whether the opinion is well-documented and well-reasoned. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. *See Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984). A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields, supra*. Indeed, whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

The medical opinions in the record are as follows:

1. Dr. Glen Baker, a pulmonologist, examined the Claimant on February 18, 2005. *DX 13 at 10.* In his report, Dr. Baker noted that the Claimant is a non-smoker and has 34 years of coal dust exposure. *Id.* Dr. Baker recorded that the Claimant's last coal mine employment involved building bradishes, scattering rock dust, and installing belt lines. *DX 13 at 11.* As part of his examination of the Claimant, Dr. Baker administered a chest x-ray, pulmonary function studies, and arterial blood gas studies. *DX 13.* At the time of the evaluation, the Claimant complained to Dr. Baker of "cough, sputum production, wheezing and shortness of breath consistent with chronic bronchitis with the production of one to two tablespoons of sputum per 24 hours." *DX 13 at 10.* Dr. Baker also noted that the Claimant experiences "mild resting arterial hypoxemia" and has a history of pneumonia. *DX 13 at 10 & 12.*

   Based on the Claimant's physical examination, social and occupational history, and the test results, Dr. Baker determined that the Claimant's symptoms "represent legal pneumoconiosis" and could be caused by coal dust exposure. *DX 13 at 10.* Dr. Baker concluded that the Claimant "has only a class 1 or 0% pulmonary impairment and should have the respiratory capacity

to do the work of a coal miner or to do comparable work in a dust-free environment." *Id.*

2. Dr. Bernard Moses, the Claimant's treating physician whose qualifications are not in the record, submitted a medical opinion on June 13, 2005. *DX 36.* Dr. Moses has treated the Claimant since November, 1993, but his opinion did not include the medical evidence supporting his opinion or a description of the Claimant's work history or exertional requirements.[8] *Id.* Based on his examination of the Claimant and on unidentified chest x-rays, Dr. Moses diagnosed the Claimant with hypertension, chronic obstructive pulmonary disease ("COPD"), and frequent bronchitis. *Id.* Dr. Moses opined that the Claimant has a chronic dust disease of the lung arising out of coal mine employment and that the disease would prevent the Claimant from performing coal mining work. *Id.*

3. Dr. Abdul Dahhan, a pulmonologist whose qualifications are in the record, examined the Claimant on November 14, 2005. *EX 1.* Dr. Dahhan noted that the Claimant is a nonsmoker who worked in the mines for 34 years. *Id.* Dr. Dahhan noted that the Claimant had primarily worked underground, shooting and drilling coal and operating a cutting machine and scoop. *Id.* Dr. Dahhan noted that the Claimant complained of dyspnea on exertion, chest pain, and a "daily cough with productive clear sputum and occasional wheeze." *Id.* Dr. Dahhan then described the results of the chest x-rays, electrocardiogram, arterial blood gas studies, and pulmonary function studies that he administered. *Id.*

   Dr. Dahhan opined that the Claimant's pulmonary function studies "indicated normal respiratory mechanics with no evidence of significant respiratory abnormalities." *EX 1.* He concluded that the Claimant "has no evidence of pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis." *Id.* Dr. Dahhan went on to state that the Claimant has the "physiological capacity from a respiratory standpoint, to continue his previous coal mining work or job of comparable physical demand." *Id.* Dr. Dahhan then diagnosed the Claimant with hypertension and cardiac enlargement. *Id.*

4. Dr. Charles Bruton, a pulmonologist whose qualifications are in the record, examined the Claimant on December 16, 2005, noting that he was a nonsmoker and had worked in the coal mines for 34 years. *CX 2.* Dr. Bruton noted that the Claimant complained of "some dyspnea on exertion and wheezes intermittently." *Id.* Dr. Bruton also noted that the Claimant

[8] Dr. Moses' medical records for the Claimant are in the record. *CX 1.* The Claimant's respiratory problems are described as "mild COPD" as late as June 13, 2005, and there are several diagnoses of bronchitis. *CX 1.* On March 14, 2005, Dr. Moses notes that the Claimant had an "abnormal" chest x-ray but provides no further detail. *Id.* On March 18, 2005, Dr. Moses noted that a CT of the Claimant's chest was "normal." *Id.* No x-ray reports, pulmonary function studies, or arterial blood gas studies were in the medical record. *Id.*

> experiences breathlessness with activity, a history of pneumonia, and an irregular heartbeat. *Id.* Dr. Bruton administered pulmonary function studies, and arterial blood gas studies and noted that they were within normal limits. *Id.* Dr. Bruton opined that the Claimant has simple coal workers' pneumoconiosis but did not address whether the Claimant is totally disabled by the pneumoconiosis. *Id.*

Comparing the exertional requirements of his last coal mining job with the physical limitations demonstrated in the record, it is determined that Claimant has not established that he is totally disabled under 20 C.F.R. § 718.204(b)(2)(iv) through a preponderance of the medical opinion evidence of record. Dr. Bruton's opinion is silent as to whether the Claimant is totally disabled and, as a result, has no probative value on the matter. On the other hand, Drs. Baker, Dahhan, and Moses each addressed whether the Claimant is totally disabled by pneumoconiosis. Drs. Baker and Dahhan determined that the Claimant is not totally disabled and Dr. Moses concluded that he is.

Dr. Moses is the Claimant's treating physician for both respiratory and non-respiratory problems and, as such, is accorded some special consideration under 20 C.F.R. § 718.104(d) of the regulations.[9] Even so, the Board held in *Parsons v. Wolf Creek Collieries*, 23 B.L.R. 1-29

[9] The regulations at 20 C.F.R. §718.104(d) (2001) require the following:

> (d) Treating physician. In weighing the medical evidence of record relevant to whether the miner suffers, or suffered, from pneumoconiosis, whether the pneumoconiosis arose out of coal mine employment, and whether the miner is, or was, totally disabled by pneumoconiosis or died due to pneumoconiosis, the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. Specifically, the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician:
>
> > (1) Nature of relationship. The opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;
> > (2) Duration of relationship. The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to obtain a superior understanding of his or her condition;
> > (3) Frequency of treatment. The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain a superior understanding of his or her condition;
> > (4) Extent of treatment. The types of testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition;
> > (5) In the absence of contrary probative evidence, the adjudication officer shall accept the statement of a physician with regard to the factors listed in paragraphs (d)(1) through (4) of this section. In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

20 C.F.R. §718.104(d) (2001). In its comments to the amended regulations, the Department states the following:

(2004) (en banc on recon.), that it was improper to "mechanically" accord greater weight to the opinion of a claimant's treating physician. In this vein, the Board noted that "[w]hile a treating physician's opinion may be entitled to special consideration, there is neither a requirement nor a presumption that treating or examining physicians' opinions be given greater weight than the opinions of other expert physicians."

Despite being the Claimant's treating physician, Dr. Moses' medical opinion that the Claimant is totally disabled by pneumoconiosis is of little probative value because his qualifications are not in the record and his opinion is neither well-documented nor well-reasoned. Dr. Moses provides no test or x-ray results and does not address the Claimant's employment or social history. While his medical records contain some references to COPD and bronchitis, Dr. Moses provides only that his medical opinion is based upon "physical exam and CXR [chest x-ray]." No test results from Dr. Moses' treatment of the Claimant are in the record and he provides no explanation for his conclusion that the Claimant is totally disabled. Additionally, Dr. Moses' medical opinion concerning the Claimant's level of disability is contrary to the objective medical evidence in the record which is discussed in the *Pulmonary Function Studies* and *Arterial Blood Gas Studies* sections above. As a result, his opinion is given less probative weight.

On the other hand, Drs. Baker and Dahhan provide well-documented and well-reasoned opinions to substantiate their conclusions that the Claimant is not totally disabled. Each examined the Claimant and considered his medical, employment, and social history; and objective medical data in the form of x-ray studies, blood gas studies, and pulmonary function studies. Each explained the test results in detail and thoroughly justified the basis of his diagnosis that the Claimant is not totally disabled by pneumoconiosis. Additionally, Drs. Baker and Dahhan's separate conclusions that the Claimant is not totally disabled are supported by the objective medical data in the record – namely, the pulmonary function studies and blood gas studies.

In conclusion, the opinions of Drs. Baker and Dahhan are more in accord with the tests of record than the opinion of Dr. Moses. Their opinions are well-documented, well-reasoned, and better supported by the objective medical evidence. Comparing the exertional requirements of his last coal mining job with the physical limitations demonstrated on this record, it is

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> The Department emphasizes that the 'treating physician' rule guides the adjudicator in determining whether the physician's doctor-patient relationship warrants special consideration of the doctor's conclusions. The rule does not require the adjudicator to defer to those conclusions regardless of the other evidence in the record. The adjudicator must have the latitude to determine which, among the conflicting opinions, presents the most comprehensive and credible assessment of the miner's pulmonary health. For the same reasons, the Department does not consider subsection (d) to be an evidentiary presumption which shifts the burden of production or persuasion to the party opposing entitlement upon the submission of an opinion from the miner's treating physician. Accordingly, the Department declines to eliminate the requirement in subsection (d)(5) that a treating physician's opinion must be considered in light of all relevant evidence in the record.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,334 (Dec. 20, 2000).

determined that Claimant has not established that he is totally disabled under 20 C.F.R. § 718.204(b)(2)(iv) through a preponderance of the medical opinion evidence of record. The Claimant's subjective complaints about his respiratory impairment, both in testimony and in his initial claim, are not sufficient to overcome the weight of the medical evidence indicating he does not have a totally disabling respiratory impairment.

### *Entitlement to Benefits*

The newly submitted evidence relating to this claim fails to establish total disability from a pulmonary or respiratory standpoint and is, therefore, not totally disabled due to pneumoconiosis. None of the pulmonary function studies or arterial blood gas studies in the record qualified to establish total disability because of respiratory or pulmonary conditions. The medical reports that diagnosed Claimant with no disability were written by qualified physicians and were supported by objective medical evidence. Claimant's subjective complaints in his testimony and claim do not overcome the medical evidence to the contrary.

In sum, the evidence presented does not establish that the Claimant's pulmonary condition has worsened since the denial of his previous claim. Therefore, the Claimant has not established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). Accordingly, the Claimant's claim must be denied.

## ORDER

IT IS ORDERED that the claim for benefits filed by the Claimant is DENIED.

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John Vittone
Chief Administrative Law Judge

**NOTICE OF APPEAL RIGHTS**: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).